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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 726

ANHEUSER-BUSCH, INCORPORATED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

MELROSE ICE CREAM CORPORATION, A DISSOLVED CORPORATION, ET AL., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 154–167) is reported in 40 B. T. A. 1100. The opinion of the Circuit Court of Appeals (R. 260–269) is reported in 115 F. (2d) 662.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 27, 1940. (R. 269.) A petition for rehearing was denied on December 19, 1940. (R. 285.) The petition for a writ of certiorari was filed on January 29, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer, Anheuser-Busch, Incorporated, agreed to transfer the assets of one of its subsidiaries, herein called New York,[1] to Borden Company in exchange for Borden stock and cash. On the same day that the New York assets were transferred to Borden and pursuant to arrangements previously made by Borden, Borden transferred the New York assets to a company, organized by Borden to receive the assets, in exchange for the latter's stock. The question is whether the profit embodied in the stock and cash received by the taxpayer constitutes taxable income to it. This question is dependent upon whether Borden was "a party to a reorganization" of New York within the meaning of Section 112 (i) (2) of the Revenue Act of 1928.

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[1] The actual name of the subsidiary was Melrose Ice Cream Corporation. The Board's findings and opinion refer to it as "Melrose", but since it is called "New York" in the opinion of the court below and in the petition for certiorari, we shall refer to it by that name in this brief.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 12–14.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 156–161) and as stipulated by the parties (R. 47–153) may be summarized as follows:

On August 6, 1930, the Borden Company (hereinafter called Borden) wrote a letter to Anheuser-Busch, Incorporated (hereinafter called the taxpayer), offering to exchange 35,000 shares of Borden stock for the assets of Melrose Ice Cream Corporation (hereinafter called New York), a subsidiary of the taxpayer, and to assume a liability in the amount of $500,000 owned by New York to the taxpayer. The liability assumed was to be satisfied by the payment of $300,000 in cash and the delivery to taxpayer of an additional 2,500 shares of Borden stock. (R. 156–158, 79–91.)

Paragraph J of Borden's letter reads in part as follows (R. 86–87):

> That at or before closing of title hereunder, you shall take and/or cause the New York company to take all proceedings necessary to change the corporate title of the New York company to a name entirely dissimilar to its present name in which the words "Anheuser-Busch" shall not appear. Such new corporate title shall be subject to our approval. It is the intent and purpose

> of this provision that we shall be at liberty to organize a new corporation under the laws of such jurisdiction as we may select under a name including the words "Anheuser-Busch" for the purpose of taking over and continuing the business now owned and/or operated by the New York company and you and/or the New York company shall cooperate with us as we may reasonably request to permit the organization and/or qualification of such new corporation in all jurisdictions where the New York company owns property and/or does business, provided, however, that such new subsidiary shall not be called "Anheuser-Busch, Inc." and that the corporate title of such new subsidiary shall be approved by you.

This offer was accepted by the taxpayer on August 26, 1930. (R. 51, 91.)

On September 9, 1930, Borden organized Anheuser-Busch Ice Cream Company, Inc. (hereinafter called Delaware). (R. 54, 160.)

On September 16, 1930, the taxpayer filed with the Secretary of State of New York its written consent to the use by Delaware of the corporate name "Anheuser-Busch Ice Cream Company, Inc." (R. 54, 132, 160.)

The minutes of the first meeting of the Board of Directors of Delaware, held on September 19, 1930, show the acceptance of an offer from Borden to transfer the New York assets to Delaware for

25,000 shares of Delaware stock to be issued to a subsidiary of Borden. The offer also recites that New York was engaged in the same kind of business for which "your corporation was organized." (R. 135, 137.)

On September 26, 1930, New York executed a bill of sale of all its assets to Borden in exchange for 37,500 shares of Borden's stock and $300,000 in cash. (R. 112–118, 159.) On the same day Borden executed a bill of sale, in substantially the same form as the bill of sale executed by New York, transferring the New York assets to Delaware in exchange for 25,000 shares of Delaware stock to be issued to a subsidiary of Borden (R. 138–144, 160–161).

New York made an assignment direct to Delaware of its interest in two leases and also entered into an agreement for the substitution of Delaware for itself in a contract for the purveyance of ice (R. 160).

C. D. Russell, who was general auditor of the taxpayer on September 26, 1930 and for many years prior to that time, testified that he helped negotiate the transaction for the taxpayer and that he knew that Borden had organized, or intended to organize, a subsidiary to operate the ice cream business formerly conducted by New York (R. 133–134). However, the taxpayer was not consulted by Borden as to the advisability of the organization of Delaware or of the transfer of

the New York assets to Delaware. The taxpayer has had no direct interest in the disposition of the assets of New York by Borden since their transfer to Borden. (R. 161.)

In its tax return for the year 1930, the taxpayer did not include as income either the cash or the stock received from Borden. The Commissioner determined that the cash received by the taxpayer should have been included as taxable gain from a sale or exchange of assets under Section 112 (d) (2) of the Revenue Act of 1928, and he assessed a deficiency accordingly (R. 16). The taxpayer thereupon filed a petition for redetermination of its income tax liability with the Board of Tax Appeals. The Commissioner, by amended answers, alleged that Borden was not a party to a reorganization, and accordingly contended that there should be included in the taxpayer's income not only the cash received from Borden, but also the value of the Borden stock (R. 23, 214). The Board of Tax Appeals found that Borden was not a party to any reorganization, and accordingly sustained the Commissioner's contention that both the cash and stock received by the taxpayer from Borden were taxable. A deficiency in the amount of $87,022.87 was determined (R. 168). The court below affirmed (R. 269–270).

ARGUMENT

I

The decision of the Board of Tax Appeals and of the court below that Borden was not "a party to a reorganization" of New York within the meaning of Section 112 (i) (2) of the Revenue Act of 1928 is, we believe, clearly correct. The decision of this Court in *Groman* v. *Commissioner,* 302 U. S. 82, establishes that where the assets of *X* corporation are transferred to *A* corporation, a subsidiary of *B* corporation, in exchange for stock of *B* corporation, *B* corporation is not a party to a reorganization of the *X* corporation. Under this decision, it is plain that if the New York assets had been transferred directly to Delaware, instead of passing through the hands of Borden, the stock and cash received by the taxpayer would be taxable. Petitioner urges that a different result should follow here because (a) the transfer was made in the first instance to Borden, and (b) the agreement between taxpayer and Borden did not specifically require the organization of Delaware and the transfer of the assets to it. Neither distinction has substance.

(a) *Helvering* v. *Bashford*, 302 U. S. 454, shows that the fact that the transfer was made in the first instance to Borden does not affect the result, because the plan contemplated the immediate transfer of the New York assets to Delaware and Borden's ownership of those assets was therefore

transitory and without real substance. In that case, this Court stated (p. 458):

> Any direct ownership by Atlas [the parent] of Peerless, Black Diamond, and Union [the subject of the transfer] was transitory and without real substance; it was part of a plan which contemplated the immediate transfer of the stock or the assets or both of the three reorganized companies to the new Atlas subsidiary.

(b) Since the plan contemplated the transfer of the New York assets to Delaware and that transfer was actually effected as part of the same transaction as the transfer of the assets to Borden, it is not material that Borden was under no definite contractual commitment to make the transfer to Delaware. *Hedden* v. *Commissioner,* 105 F. (2d) 311 (C. C. A. 3d), certiorari denied, 308 U. S. 575, rehearing denied, 308 U. S. 636; *Mellon* v. *Commissioner,* 36 B. T. A. 977, 1078. The rule of the *Groman* and *Bashford* cases certainly cannot be circumvented by the simple device of giving the initial transferee an option, rather than putting it under a definite obligation, to transfer the assets to the company which all parties intend should have them upon completion of the entire transaction. The determinative fact here is that the transfer by Borden to Delaware was contemplated by all parties to the plan, that the taxpayer promised Borden to cooperate, and did cooperate, in the effectuation of that transfer, and that upon

completion of the entire plan the requisite continuity of interest for a statutory reorganization was lacking.

The conclusion of the Board of Tax Appeals that the transfer to Delaware was "part of the effectuation of the plan of reorganization" and not independent of it (R. 164) is not open to serious question. With respect to this matter the Board stated (*id.*):

> Delaware was organized before the closing of title. It was created for the express purpose of acquiring the property and with the cooperation, as was required by the contract, of petitioner and Melrose. It was entitled by the terms of a specific agreement with Borden to receive all of the assets transferred and did in fact immediately receive them. Some of the assets were actually transferred directly to the subsidiary without even the intervention of Borden. This would have been a technical noncompliance with the reorganization agreement except on the assumption that upon the exercise of Borden's option both parties contemplated that the subsidiary and not Borden was the true party to the transfer. The step is characterized in petitioner's brief as "confirmatory short-cuts for record purposes", a statement consistent with the view that all of the transfers through Borden were merely the longer path to the contemplated result that the subsidiary was to be the recipient of all the trans-

ferred assets. *Minnesota Tea Co.* vs. *Helvering,* 302 U. S. 609. And, if more were needed, the contract shows that it was intended that the subsidiary, if organized at all, would be created before the transfer of the assets, because the help of Melrose in its organization is stipulated for, and Melrose was to be dissolved immediately after the closing.

II

Petitioner's contention that the decision below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Portland Oil Co.* v. *Commissioner,* 109 F. (2d) 479, certiorari denied, 310 U. S. 650, is without merit. In the *Portland* case the question was whether a transfer was made to a corporation controlled by the transferor within the meaning of clause B of Section 112 (i) (1). It did not, as does this case, involve a reorganization under clause A of that section. The Court there held that the transfer did come within clause B because, after completion of the transfer, the transferor was in control of the transferee company; it considered immaterial the fact that immediately thereafter the *transferor* corporation was dissolved and liquidated. A decision holding that the dissolution and liquidation of the transferor corporation does not affect the nature of the transfer as a reorganization is, we believe, plainly not a precedent for holding that a transferee company is a party to a

reorganization when it serves simply as a conduit of the title to the transferred assets.

III

Petitioner also asserts that the decision below is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Schuh Trading Co.* v. *Commissioner,* 95 F. (2d) 404. Insofar as the *Schuh* case may be said to be opposed to the decision in this case, however, it has been superseded by the more recent decision of the same court in *United Light & Power Co.* v. *Commissioner,* 105 F. (2d) 866, certiorari denied, 308 U. S. 574. Not only is the decision in the *United Light* case in accord with the decision in the present case, but the court, in deciding it, relied heavily upon *Hedden* v. *Commissioner, supra.* The *Hedden* case is direct authority in support of the present decision.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FEBRUARY, 1941.